IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 87 of 1998
In
CIVIL APPLICATION No. 147 of 1998
In MISC. CIVIL APPLICATION No. 6 of 1992
With
CIVIL APPLICATION No. 180 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA
HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?Yes

2 To be referred to the Reporter or not ?Yes

3 Whether their Lordships wish to see the fair copy of the judgment ?No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?No

5 Whether it is to be circulated to the civil judge ?No

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TEXTILE LABOUR ASSOCIATION - Appellant(s)

Versus

I.F.C.I. & 4 - Opponent(s)

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Appearance :
MR DS VASAVADA for Appellant(s) : 1,
MR HV CHHATRAPATI for Opponent(s) : 1,
None for Opponent(s) : 2,
MR AC GANDHI for Opponent(s) : 3,
NOTICE SERVED for Opponent(s) : 4 - 5.
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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA
and
HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 09/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.M.MEHTA)

1. Textile Labour Association, appellant, has filed this appeal against the judgment and order dated 25th August, 1998, passed by this Court in Civil Application No.147 of 1998 with Company Application No.265 of 1998 in Misc.Civil Application No.6 of 1992 i.e., in the case of Industrial Finance Corporation India Vs. O.L. Of Amruta Mills Ltd.

2. Mr.D.S.Vasavada, learned advocate appeared for the appellant – Textile Labour Association. He has invited our attention to the following facts:

2.1 The appellant submits that by an order dated 22nd November, 1991, in Company Petition No.72 of 1991, the Amruta Mills Ltd., was ordered to be wound up by this Court. Pursuant to the order dated 12th March, 1997, passed by this Court in Misc.Civil Application No.6 of 1992, the assets of the Amruta Mills Ltd. (in liquidation) (hereinafter referred to as “the Company”), other than lands and

buildings of the Company have been sold at a public auction. The sale was conducted under the recovery application filed by the Industrial Finance Corporation of India Ltd. (IFCI) under the provisions of Sec.30 of the Industrial Finance Corporation Act, 1948 (hereinafter referred to as “the Act”). The sale was conducted by the Sale Committee appointed by the Court. The sale committee comprised of the Official Liquidator, a representative of the Textile Labour Association (TLA), representatives of Industrial Development Bank of India (IDBI), Industrial Credit and Investment Corporation of India Ltd. (ICICI), Industrial Investment Bank of India (IIBI) and Punjab National Bank (PNB) and the IFCI. The Sale Committee was headed by the representative of the applicant-IFCI.

2.2 The offers were invited through the advertisements in the leading Newspaper dated 5.6.1998. The plant and machinery and miscellaneous fixed assets, other than land and buildings were valued at Rs.2.67 crores. The Earnest Money Deposit

was fixed at Rs.30 lacs. The offers were opened on 6.7.1998. In all, 39 offers were found valid and the three highest offers received on 6.7.1998 were as under:-

Name of the Party	Amount offered (Rs.in crores)
1. Amatya Enterprise (P) Ltd.	1.51
2. Aerotex Industries	1.22
3. Monotex Corporation	1.20

2.3 At the auction held on 8.7.1998, the offerers present were requested to raise their offers upwards. After the bidding at the auction, the bids of the following three parties were found to be the highest:-

1.	M/s.Shri Rajeshwari Textiles Co.	Rs.2.41 crores
2.	Amatya Enterprises (P) Ltd.	Rs.2.38 crores
3.	Aerotex Industries	Rs.2.34 crores

2.4 The Sale Committee felt that the offers received were less than the value mentioned in the valuation report on account of several factors.

2.5 In Civil Application No.147 of 1998, the IFCI through its representative as Chairman of the Sale Committee has sought permission of this Court to accept the offer of M/s.Rajeshwari Textiles Co., for purchasing the plant and machinery and other miscellaneous fixed assets excluding lands and buildings for Rs.2.41 crores being the highest offer.

2.6 Thereafter M/s.Rajeshwari Textile Co., (hereinafter referred to as “the purchaser” for the sake of convenience) filed a Company Application No.265 of 1998 praying for confirmation of sale in favour of the said party and with a request that it may be permitted to make payment of full consideration within a period of three months from the date of acceptance of the bid and permission to lift the goods within a period of six months from the date of last payment and certain other prayers are also made.

2.7 It appears that thereafter the Court has accepted the offer of M/s.Rajeshwari Textile Co.,

in the sum of Rs.2.41 crores in this behalf. The said offer was accepted on certain terms and conditions mentioned in the order confirming the sale in this behalf.

2.8 After that the IFCI also prayed in Civil Application No.147 of 1998 that the costs set out in Annexure “C” to the application incurred by the applicant be paid to the IFCI and that all such payments have priority over other payments that may be required to be paid from out of sale proceeds. The amount claimed by the IFCI are as under:-

1.	Rs.58,978/-	Security expenses
2.	Rs.20,475/-	
	Rs.13,032/-	

	Rs.33,507/-	Cost of advertisement valuation and incidental expenses.
3.	Rs.4,30,975/-	Insurance premium charges.
4.	Rs.6,98,670/-	Legal fees, charges court fees and charges for bringing the documents from Mumbai etc.

Rs.12,23,268/-

2.9 The IFCI has claimed the aforesaid amounts as Actual Costs incurred. At the time of hearing the learned counsel of the IDBI has supported the aforesaid claim of the IFCI for costs. However, Mr.Vasavada, learned counsel for the TLA has vehemently opposed the same and has relied upon the certain decisions of this Court. Thereafter our learned Brother Justice M.S.Shah has heard the matter and decided as under:

> "Having heard the learned counsel for the parties on the aforesaid disputes, it appears to the Court that while the IFCI has made out a case for claiming reimbursement of the above first three items, there is no case made out for the fourth items of legal fees and other expenses to the tune of Rs.6,98,670/- and the said claim is disallowed.
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> "As far as the payment of insurance premium charge is concerned, there is nothing on record to show

the apportionment of the premium relatable to the plant and machinery on the one hand and the premium relatable to the land and building on the other hand. Hence, the IFCI will be entitled to claim that part of the insurance premium which relates to be plants and machineries. It will be open to the IFCI to place necessary material before the Official Liquidator and to claim reimbursement of the insurance premium relatable to the plant and machinery. It is accordingly held that the IFCI is entitled to get reimbursement of (i) Security expenses Rs.58,978/- (ii) costs of advertisement, valuation and (iii) incidental expenses Rs.33,507/- and the insurance premium relatable to plants and machineries.

"However, the aforesaid amounts shall be appropriated by the IFCI out of the sale proceeds of the plants and machineries after producing the necessary material before the Official Liquidator in support of their claims for the aforesaid amounts.

"These applications are accordingly disposed of.

Liberty to move the Court in case of difficulty."

2.10 The present appeal has been filed by TLA against the order of learned Single Judge wherein the learned Single Judge has accepted the contention of IFCI for reimbursement including security expenses, cost of advertisement, valuation, incidental expenses and the insurance premium relatable to plants and machineries. However, the learned Single Judge has observed that the aforesaid amounts shall be appropriated by the IFCI out of the sale proceeds of the plants and machineries after producing the necessary material before the Official Liquidator in support of their claims for the aforesaid amounts. This aspect has been challenged by the TLA in this behalf.

3. Mr.Vasavada, learned advocate for the appellant has stated that when the appeal was filed, the Division Bench of this Court in the case of Gujarat State Financial Corporation Vs. Official Liquidator and others reported in 87 Company Cases 658

supported their contention. The learned counsel has submitted that the learned Single Judge ought to have realised that the secured creditors have chosen to remain outside the winding up proceedings and therefore it is not permissible to claim the reimbursement of expenses incurred by them even after winding up of the Company. The learned counsel further submitted that the learned single Judge ought to have held that when a secured creditor opts to realise the security under the Special Act then it is also obligatory on it to bear the entire brunt of expenditure incurred by it. It was stated that the learned Single Judge ought not to have granted the reimbursement in this behalf. The said Division Bench judgment reported in 87 Comp. Cases 658 had followed the decision of the Division Bench of Karnataka High Court in International Coach Builders Ltd. (in liquidation) Vs. Karnataka State Financial Corporation (1994) 81 Comp. Cases 19 (Kar). However, the Hon'ble Supreme Court reversed the said decision of the Karnataka High Court in (2003) 114 Comp. Cases 614 and also by the same judgment, in Civil Appeal No.6303 of

1995, the judgment of the Division Bench of this Court in 87 Company Cases 658 was set aside.

4. However, at the time of hearing of this appeal, Mr.Vasavada, learned counsel has stated that though originally when appeal was filed and when all these arguments were attracted, the Division Bench judgment was in his favour. However, at this stage it will not be possible for him to contend the appeal further because the Hon'ble Supreme Court in the case of International Coach Builders Ltd. Vs. Karnataka State Financial Corporation reported in 114 Company Cases 614 has reversed the judgment of this Court in Gujarat State Financial Corporation's case (supra). In that case on page 626 & 627 the Hon'ble Supreme Court has observed like this:

> “Since the official liquidator is in the position of a co-mortgagee, the SFCs cannot act independently or by ignoring him for enforcing their security. It is established that, in case of co-mortgagees, all of them should join in the suit for enforcing the security, but if some of them refuse to join, they have to be included as

defendants, not merely as proforma parties, but as necessary parties, inasmuch as the mortgage right vests in them along with the plaintiffs-mortgagees. (see in this connection the judgment of the Privy Council in Sunitibala Debi Vs. Dharae Sundari Debi, AIR 1919 PC 24). The same principle would be substantially true and applicable in the case of a mortgagee and a pari passu charge-holder over the same security for realising the security. The realisation of the security can only be done by both the charge-holders joining and realising the security simultaneously. If a sale takes place, it can only be simultaneously for recovery of the claim of all pari passu charge-holders and sale proceeds are required to be divided proportionately in the same proportion as their dues.

"In support of their respective contentions, parties have referred to and relied upon judgments of different High Courts. The view taken by the Bombay High Court commends itself to us. The Division Bench of the said High

Court pointed out that, like a secured creditor, the official liquidator as a pari passu charge holder cannot independently bring the security to sale ignoring the secured creditor. He must, therefore, either obtain concurrence of the secured creditor for sale and take the court's sanction, or he can apply for sanction of the court after notice to the secured creditor. In either event, the court while granting sanction may impose appropriate conditions and give directions regarding the conduct of the sale, the fixing of the reserve bid, acceptance of the bid, confirmation of sale and distribution of sale proceeds.

"Of course, even in such a situation, if the same property was mortgaged to more than one secured creditor, they had to either come to an agreement, or in the event of disagreement, there had to be a suit in which dissenting mortgagee had to be sued as a necessary party defendant. No doubt section 29 of the SFC Act was intended to place SFCs on a better footing. But, in our view, this better footing is

available only so long as the debtor is not a company or is a going company. The moment a winding up order is made in respect of a debtor company, the provisions of sections 529 and 529A come into play and whatever superior rights had been ensured to SFCs under the provisions of the SFC Act are now subjected to and operate only in conjunction with the special rights given to the workmen, who as pari passu charge holders are represented by the official liquidator. We are, therefore, of the view that the unhindered right hitherto available to the SFCs to realise their security, without recourse to the court, no longer holds true as the right vested in the official liquidator is a statutory impediment to such exercise and has to be reckoned with. And since the official liquidator can do nothing without the leave or concurrence of the court, all necessary applications must, therefore, come to the company court.

"We do not really see a conflict between section 29 of the SFC Act and the Companies Act at all, since the rights under section 29 were not

intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in A.P.State Financial Corporation case (supra). This court pointed out therein that section 29 of the SFC Act cannot override the provisions of section 529(1) and 529A of the Companies Act, 1956, inasmuch as the SFCs cannot exercise the right under section 29 ignoring a pari passu charge of the workmen."

5. After laying down the said principle, the Hon'ble Supreme Court was also concerned with the appeal filed by the liquidator against the case of Gujarat State Financial Corporation (supra). Then the Hon'ble Supreme Court in paragraphs 29 and 30 has observed like this:

"The Division Bench of the Gujarat High Court in CA No.6303 of 1995 has, however, struck a discordant note. The Division Bench was impressed by the fact that in M.K.Ranganathan

this Court had emphasised the right of a secured creditor to realize his security by standing outside the winding up of a company. It also emphasised that the proviso to Section 529 of the Companies Act operates only where a secured creditor, instead of relinquishing his security and proving his debt, proceeds to realise his security. In the words of the Gujarat High Court: “But the fact remains, it has yet been left at the option of the secured creditor to realise the security without proving his debt in the winding-up proceedings.” This seems to be the linchpin of the reasoning.

“In our view, the reasoning of the Gujarat High Court that in case the secured creditor does not opt to realise the security, the liquidator, by dint of the proviso to Section 529, does not become a charge-holder in the estate of the company so as to exercise the right of a simple mortgagee as envisaged under Section 100 of the Transfer of Property Act,

appears to be non sequiur. If a secured creditor does not opt to stand outside the winding-up but relinquishes his security and proves his debt in the winding-up, then there is no doubt that official liquidator will come into custody of all the assets of the company in liquidation and the distribution of the assets would have to proceed in accordance with the provisions of Section 529-A of the Companies Act, in which case the secured creditor stands in line as an unsecured creditor. It is only when SFC as a secured creditor opts to stand outside the winding-up and seeks to realise its security that the conflict, if any, can arise. We have already indicated as to who must yield in such a clash of the titans. The fact that the liquidator or the workmen do not have a right independently to enforce the charge, unless the creditor decides to stand outside the winding-up, does not make any difference to the situation, in our view. It is not the contention of SFCs that they do not desire to exercise the option

available to them of standing outside the winding-up. In fact, it is their contention that as mortgagees they have a right to stand outside the winding-up and are not subject to the supervisory jurisdiction of the Company Court. They also contend that, unlike other mortgagees, they have a special right by reason of Section 29 of the SFC Act of taking possession of the assets and realising them by sale, transfer and so on. We are, therefore, unable to accept the reasoning of the Gujarat High Court as correct."

5.1 In paragraphs 32 and 36 (on page 630 of Company Cases) the Hon'ble Supreme Court has observed like this:

"We, therefore, hold as under:

1. The right unilaterally exercisable under Section 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up.

2. SFCs cannot unilaterally act to realise the mortgaged properties without the consent of the official liquidator representing workmen for the pari passu charge in their favour under the proviso to Section 529 of the companies Act, 1956.

3. If the official liquidator does not consent, SFCs have to move the Company Court for appropriate directions to the official liquidator who is the pari passu charge-holder on behalf of the workmen. In any event, the official liquidator cannot act without seeking directions from the Company Court and under its supervision."

"Civil Appeal No.6303 of 1995 is allowed. The judgment of the Division Bench of the Gujarat High Court is set aside and the judgment of the Company Judge is upheld. Gujarat State Financial Corporation has the same liberty for moving the learned Company Judge for appropriate directions for realisation of the

sale proceeds of the assets."

6. The observations in the above-referred Hon'ble Supreme Court judgment in (2003) 114 Company Cases 614 i.e. International Coach Builders Ltd. (supra) are a complete answer to the stand taken by the learned advocate Mr.Vasavada. In view of this, we are of the view that the appeal filed by TLA is required to be rejected. Hence the appeal is dismissed in limine. The order of the learned Single Judge dated 24/25th August, 1998, passed in Civil Application No.147 of 1998 with Company Application No.265 of 1998 is confirmed in view of the judgment of the Hon'ble Apex Court in the case of International Coach Builders Ltd., (supra). We see no merits in the contention of Mr.Vasavada in this behalf. It is no doubt true that earlier the contention of Mr.Vasavada was based upon the Division Bench judgment of this Court, however, once the Hon'ble Apex Court has overruled the said decision of Division Bench of this Court, the said decision of the Division Bench is no longer a good law and we have to follow the judgment of the

Hon'ble Apex Court in this behalf.

7. In view of the same, Civil Application No.180 of 1998 is also disposed of with no order as to costs.

(K.M. Mehta, J.)

(Akil Kureshi, J.)

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